Journal of Law and Policy
2001
Articles
*737

Miller versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-Toting in Texas in the Nineteenth Century--and Today

Cynthia Leonardatos [FNa1]
David B. Kopel [FNaa1]
Stephen P. Halbrook [FNaaa1]

Introduction

Does the Second Amendment's protection of the right to keep and bear arms provide protection against state gun laws or only against federal gun laws? Should courts aggressively use the Fourteenth Amendment as a tool against racially biased big-city police departments that allegedly use excessive force? Can a man *738 who claims that he shot a police officer in self-defense get a fair trial in Texas, and is the Texas death penalty system biased against defendants? These issues are very much in the news as the American legal system enters the twenty-first century. It was not very long ago that the fortuitous presence of a camcorder proved that Rodney King had been illegally assaulted by the police. From New York City to Los Angeles, and very many places in between, charges of excessive and racist police violence are widespread. [FN1] Yet as modern as these issues are, they are not brand new. Indeed, they were the subject of a U.S. Supreme Court case in 1894: Miller v. Texas. [FN2]

In this article, we examine Miller to see how far the American and Texas criminal justice systems have, or have not, evolved since 1894 in the context of a highly-publicized shooting of a police officer in alleged self-defense. Today's American legal community tends to think of itself as vastly more enlightened than it was in the bad old days of the 1890s, but we suggest that things have not progressed quite as far as the American legal community might claim.

Additionally, we examine Miller v. Texas' implications for firearms law doctrine. In determining whether the Fourteenth Amendment extends the reach of the Second Amendment against state law, courts have reached all the way back to an 1886 case, Presser v. Illinois, [FN3] claiming that the Second Amendment is not incorporated into the Fourteenth Amendment. [FN4] Such a stretch by the courts is unusual in itself, since modern Fourteenth Amendment incorporation doctrine does not tend to find that cases from before *739 the 1920s create binding precedent. [FN5] Presser, a case upholding the State of Illinois' authority to suppress armed public parades, contained dicta upon which the anti-incorporation argument is founded. We briefly look at

Presser to illustrate that this Second Amendment anti-incorporation foundation is ambiguous and opaque. We then turn to Miller v. Texas that came a decade later and addressed the incorporation of the Second, Fourth and Fifth Amendments. [FN6] According to Miller, the Fourteenth Amendment incorporation of these amendments was still unresolved. [FN7] Therefore, Miller suggests that Presser did not definitively rule out incorporation of the Second Amendment into the Fourteenth Amendment.

I. Franklin Miller's Story

A. Miller and a Black Woman Live Together

Franklin P. Miller was born in Virginia in 1855. [FN8] As the son of a successful planter, [FN9] he was fortunate enough to have received *740 ten years of formal education and was proficient in reading and writing. [FN10] When he was twenty-five years old, he moved to Waco, Texas and married a woman whose name he later forgot. [FN11] Miller and his bride had been married for only three weeks when he decided to leave her after realizing that they could not live together. [FN12] After spending some time in Indian territory, Miller returned to Texas in 1890 and established a home and a shoemaking business in Dallas. [FN13] His residence and shop occupied three rooms of a house that he shared with a Mrs. Perkins and her blind son. [FN14]

About a year after returning to Texas, Miller hired Mattie Anderson, a twenty-four year old "negress" to wash and cook for him in exchange for a monthly stipend and room and board for herself and her two-year-old mulatto daughter. [FN15] Anderson was separated from her husband, Harry Anderson, a black man who lived in the eastern section of Dallas County. [FN16] Notwithstanding the suspicions of certain townspeople, both Anderson and Miller denied that Miller was the father of her daughter. [FN17] They insisted that their relationship was entirely a professional one. [FN18]

*741

B. Miller's Arrest and His Relationship with the Police

In early 1892, Miller was arrested by Dallas Police Officers Lamar and Estelle on charges relating to the fact that Miller and Anderson were living together. [FN19] The reporters who covered the Miller/Anderson saga failed to include any information as to whether the officers had probable cause for this arrest or if they were improperly motivated by racial animus. It is not difficult to surmise that the white Dallas County police officers may have disliked Miller simply because he was openly living with a black woman and her light-skinned child, whom they probably thought was Miller's daughter. In the late nineteenth century, sexual relations between whites and blacks were strongly discouraged, especially if a child resulted from the union. [FN20] Notably, while the *742 Texas adultery and fornication statutes were punishable only by a fine, the miscegenation law carried a prison term. [FN21] If the officers could imprison Mr.

Miller for a few years for violating this statute, Mrs. Anderson would probably be forced to leave the county in shame to seek work elsewhere. Her prospects would have been bleak. [FN22]

It seems extremely improbable that Miller was the only single white male living in Dallas who employed a black single mother as a live-in domestic servant. It is therefore reasonable to infer that the police had some reason (not necessarily a good reason) for believing that the Miller/Anderson relationship had a sexual component.
*743

Miller was unhappy about his brush with the law and he publicly threatened the officers in the months following his arrest. [FN23] Miller claimed that several people had informed him of threats against his life, including "a young gambler with a light mustache," and three Negroes who told him "to look out and be on my guard; that the officers were after me because I had that negro woman cooking and staying with me." [FN24] Miller, while holding Anderson's daughter, was heard by several people to say, "I will kill the first s--of a b--of a policeman that attempts to arrest me." [FN25] Miller was seen brandishing his pistol in front of his business on the same day he made this threat. [FN26] He owned a .38 caliber Smith & Wesson revolver and, after expecting trouble with the officers, he purchased a Colt .45 revolver as well. [FN27] A week later, Miller ended up in a gun battle with the police.

C. Texas Firearms Laws

According to the 1876 Texas Constitution: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the state; but the Legislature shall have the power by law to regulate the wearing of arms, with a view to prevent crime." [FN28] The 1875 Constitutional Convention in Texas, which adopted this provision, gave the Legislature the power to regulate the "wearing of arms." [FN29] Any statutory regulation, however, must be enacted "with a view to prevent crime." [FN30]

After learning of Miller's statements about resisting any future arrest, Officers Lamar and Estelle obtained an affidavit charging *744 Miller with carrying weapons, [FN31] cursing, and swearing. [FN32] Regarding the weapons charge, Miller was arrested for violating a statute entitled, "An Act to Regulate the Keeping and Bearing of Deadly Weapons," which read in pertinent part:

> Any person carrying on or about his person . . . any pistol . . . for the purpose of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing . . . shall be guilty of a misdemeanor . . . Provided, that this section shall not be so construed as to prohibit any person from keeping or having arms on his or her own premises or place of business. [FN33]

Section 2 of the Act provided that a person asserting that he carried arms because he was in danger of attack,

> shall be required to show that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage; and that the arms so carried were borne openly, and not concealed beneath the clothing; and if it shall appear that this danger had its origin in a *745 difficulty first commenced by the accused, it shall not be considered a legal defense. [FN34]

Violators of this law were subject to punishment by a fine of not less than $25 nor more than $100 and a forfeiture of the weapon. [FN35] The Act allowed state officials to arrest a suspect without a warrant. [FN36] The Texas state courts, when interpreting this act, relied on the precedent set by State v. Duke [FN37] in which the Texas Supreme Court ruled that the federal Second Amendment did not limit state action. [FN38]

D. Miller's Second Arrest, and the Shoot-out

Dallas Police Officers Lamar and Estelle gave their affidavit to Officer Riddle and Officer Early to serve on Miller. [FN39] Officers Riddle and Early went to his shop on the evening of Thursday, June 16, 1892, but departed after finding the business closed. [FN40] The officers returned to the shop the next morning at approximately eleven o'clock. [FN41]

In newspaper interviews, Franklin Miller, Mattie Anderson, a bystander, and Officer Early each offered different accounts of the attempted arrest and subsequent shooting in the shoemaking shop on the morning of June 18, 1892.

1. Franklin Miller's Version

During an interview with a reporter while he was in prison, Miller gave a somewhat improbable version of the events leading up to the shooting of Officer Riddle. [FN42] Miller stated that he was *746 sitting on his bench mending a shoe when he heard the click of a pistol and someone walking on the sidewalk. [FN43] Miller looked up and saw two officers standing side by side within two feet of him. [FN44] Without explanation, they each fired one shot, which missed Miller and struck the wall. [FN45] Miller reached under his bench, grabbed his Colt .45, and returned fire. [FN46] One officer ran across the street and continued shooting at Miller, and the other officer fell. [FN47]

Miller's account of the shooting seems implausible. For safety reasons, well- trained officers would not have stood side by side within two feet of a subject they considered to be armed and potentially dangerous. The stance would have left them vulnerable to an act of violence by Miller, and it would not have provided them with the necessary cover and concealment. If Miller is to be believed, one would have to accept the proposition that the officers, who were standing two feet away from him with their weapons in their outstretched arms, missed their target from less than one foot away. Additionally, the officers' positions would have jeopardized any benefit of a surprise attack. On the other hand, it is possible that the officers were incompetent shooters, poorly trained, and did not know elementary rules concerning how to approach an armed suspect.

2. Mattie Anderson's Version

Mattie Anderson, Miller's live-in maid, related another version of the story to the same reporter who interviewed Miller. [FN48] Anderson stated that she was in the middle room of the building *747 when she heard the first shot. [FN49] She ran into the kitchen and asked Miller what was happening. [FN50] He responded: "These d--n policemen are bothering me" and went to his safe to retrieve more cartridges. [FN51] Possibly realizing that Anderson was scared for herself and her daughter, Miller told her to leave, and she escaped through a window. [FN52]

3. The School Principal's Version

W.R. Miller, principal of a nearby public school, also witnessed the shooting and offered a different account. [FN53] The principal stated that as the two police officers were walking by the shop, Franklin Miller stepped into the doorway with a large pistol in his hand and fired one shot in Officer Riddle's direction which missed. [FN54] Officer Early turned and attempted to draw his weapon, but stumbled to the ground. [FN55] Miller then shot and killed Riddle before Early could obtain cover behind the corner of a building and return fire. [FN56]

The principal's story seems dubious for one reason: If Miller attacked the officers without warning as they were walking outside his business preparing to serve Miller with the affidavit, Officer Early certainly would have recounted this more sympathetic version of events.

4. The Police Version

According to Officer Early, Officer Riddle and he wanted to execute a cautious approach as they neared the building because they considered Miller a dangerous subject. [FN57] Thus, they walked *748 on the dark side of the street, and they converged on the door with Early brandishing his six-shooter and Riddle behind him holding a club. [FN58] As they stood in front of the door, Miller drew one of his pistols from under his bench and fired two shots at Officer Early, who stumbled backward and fell on the sidewalk. [FN59] Miller then opened fire on Officer Riddle, striking him once above the left eye and once through the left arm. [FN60] Officer Early unsuccessfully returned fire at Miller, who had concealed himself inside the building. [FN61] Officer Early explained that he could not have discharged his weapon when Miller reached for his firearm because he did not "have a self-acting pistol." [FN62]

E. The Attempted Lynching After the Shoot-out

The witnesses do not disagree on what transpired after Officer Riddle was shot. Once Miller and Officer Early ceased firing, Miller retreated to the center of the room, "swearing that he would kill anybody who approached him." [FN63] A large crowd had begun to form and although some of them were armed, Miller kept them at bay with his pistol. [FN64] Two men in the crowd walked across the street, picked up Officer Riddle, and took him to a house where he *749 died about a half an hour later. [FN65] The crowd reached mob proportions of at least 160 people, and cries of "lynch him" and "burn him out" could be heard. [FN66] Miller may have acquired a

negative reputation with the populace due to his relationship with a black woman, his slaying of Officer Riddle, or both. The true origin of this animosity is unknown.

Assistant Chief of Police Cornwell tried to negotiate Miller's surrender. [FN67] Miller was afraid that if he did surrender, the impassioned mob would kill him. [FN68] After some discussion, Cornwell walked around to the back of the house, kicked in the door, and called to Miller to give himself up or be shot. [FN69] Miller handed Cornwell his pistol, and Officer Alexander dragged Miller outside. [FN70]

Over a dozen officers had the responsibility of safely placing Miller in the patrol wagon without interference from the angry throng who continued to yell, "mob him, hang him, hang him." [FN71] As the police were attempting to lift Miller into the wagon, a man *750 threw a noose around Miller's neck and passed the rope to a boy on a horse. [FN72] The boy wrapped the rope around the pommel of his saddle, whipped his horse, and the horse dragged Miller away from the officers and brought him down on his head. [FN73] Fortunately for Miller, however, the crowd was so dense that the animal could not move forward and the rope became unhitched from the saddle. [FN74]

As Miller lay on the ground semi-conscious from the attempted strangulation, another member of the crowd struck Miller on the back of the head with a shotgun and tried to hit Miller a second time before the officers threw Miller into the wagon. [FN75] The police drove the wagon through the crowd, but they continued to encounter hostile townspeople en route to the jail. [FN76] A bystander jumped into the moving wagon and tossed a rope around Miller's neck. [FN77] An officer managed to remove the rope before the man could jump off the wagon with Miller in tow. [FN78] When the officers finally arrived at the jail with Miller, someone unsuccessfully tried to shoot Miller as the heavy iron doors to the jail were closing. [FN79] Although Miller had killed a police officer, he owed his life to the law enforcement officers who had the difficult job of protecting him from the mob. [FN80]

The relentless crowd gathered in front of the jail while speech-makers opined about the "higher law that society owed itself where *751 statutory law did not prove effective in practice." [FN81] Later in the day, circulars announcing a mass meeting at City Hall at 5:30, at "which all law-abiding citizens were required to be present," were distributed throughout the city. [FN82] Three hundred men gathered in an auditorium and listened as a gentleman named Ford House gave the opening remarks, stating that the purpose of the meeting was to call all law-abiding citizens together "to protect against the murders, protect themselves and [to] avenge the deaths of the officers." [FN83] The crowd of three hundred men cheered as House stated that "we must get those men in jail, even if some of us have to die for it. Now men, no boys, I want volunteers to go and get the cannon. Who will go with me?" [FN84] Mayor Connor and Chief of Police Jim Arnold addressed the crowd and attempted to dissuade them from taking the law into their own hands. [FN85] After one man in the auditorium interrupted the Mayor by shouting that officers were moving Miller from the jail, the crowd left the hall and stormed the jail screaming, "lynch him" and "hang him." [FN86]

Mayor Connor, Chief of Police Arnold, Sheriff Lewis, a couple of judges, and over fifty officers blocked the mob from entering the *752 jail and exclaimed that they would protect Miller to the

death. [FN87] After several heated exchanges between the leaders of the crowd and Miller's protectors, a heavy rain began to fall, which caused the townspeople to disperse. [FN88] Regarding the attack on the jail, Miller told a reporter "that it was all uncalled for . . . I knew I would be protected by the sheriff. When the people hear both sides I think I will get justice." [FN89] The Grand Jury returned a bill of indictment against Miller the same day. [FN90]

F. Miller's Murder Trial

Jury selection in Franklin Miller's murder trial was completed a month later on July 20, 1892, before Judge Charles Fred Tucker. [FN91] The state's first witness was officer T.J. Early who had accompanied Officer Riddle to serve the affidavit on Miller. [FN92] Early's testimony was consistent with the statement he gave the day of the shooting. He testified that as he stepped into Miller's doorway, he saw Miller grab a pistol. [FN93] Early saw a flash, fell to *753 the ground and saw Miller shooting at him. [FN94] Early fired his pistol twice in Miller's direction. [FN95]

George Miller, a saloon keeper, testified next for the state. [FN96] Miller testified that on the night before the shooting, Franklin Miller was walking along the street with a black baby in one arm and his pistol in his other hand. [FN97] He was looking for Riddle and threatening to kill the officers and then himself. [FN98] George Miller stated that approximately ten minutes prior to the shooting, he saw Officer Riddle in front of his saloon. [FN99] George Miller told Riddle and Early about the defendant's threats the previous evening. [FN100] Regarding the shooting, the witness stated that he was standing about fifty feet behind Officer Riddle when Riddle was shot. [FN101] The first shot was fired from inside the defendant's house, and caused Officer Early to stumble backward. [FN102]

Several other people testified as witnesses to the shooting. Fred Flora, a twelve-year-old black child testified that on the night before the shooting, he heard Miller say that he was going to kill "that grayheaded Riddle or any other son of an etc. that stopped him." [FN103] Similarly, Earl Roberts, a wood dealer, testified that he also heard the threat the night before the shooting and added that Miller had stated that the policemen had bothered him so much that *754 "he was crazy." [FN104] Two other witnesses stated that they observed Miller shoot Riddle as he lay on the ground. [FN105]
After the state rested its case, the defense recalled Earl Roberts to the stand, to testify that Officer Riddle was extending his arm to fire when he was shot. [FN106] Defense witness Van Corkham testified to finding bullet holes inside Miller's house, which would bolster Miller's claim of self-defense. [FN107] Tom Duffy, another defense witness, testified that after Miller was arrested, Officer Riddle's weapon showed signs of having been recently fired. [FN108]

On July 23, 1892, the jury returned a verdict of guilty of murder in the first degree [FN109] against Miller and sentenced him to death. [FN110] The jury rejected Miller's defense of justifiable homicide, [*755 FN111] and they refused to find him guilty of the lesser offenses of second degree murder and manslaughter that had been included in the indictment. [FN112]

G. Miller's Appeal

Miller appealed his case to the Court of Criminal Appeals of Texas, which upheld his conviction on January 21, 1893. [FN113] On July 17, 1893, Judge Tucker sentenced Miller to death and fixed August 18, 1893 as the date of execution. [FN114] When Judge Tucker asked Miller if he had any reason why the death sentence should not be imposed, Miller replied that he was not given a fair trial and that he killed Officer Riddle in self-defense after the officers fired *756 at him. [FN115] Miller's appeal to Texas Governor Hogg to commute his sentence was rejected on August 14, 1893. [FN116]
Miller took his case to the Supreme Court, and lost unanimously. [FN117] After Miller lost his Supreme Court appeal, his conviction was affirmed on May 9, 1895 and he was sentenced to death on May 16, 1895. [FN118] On July 8, 1895, Governor C.A. Culberson commuted his death sentence to life imprisonment. [FN119] After serving sixteen years in the penitentiary, Miller was pardoned by Governor T.M. Campbell on December 14, 1908. [FN120]

II. The State of Second Amendment and Fourteenth Amendment Doctrine in the Supreme Court Prior to Miller v. Texas

A. United States v. Cruikshank

Following the enactment of the Fourteenth Amendment, the Supreme Court heard two major cases involving the applicability of the Second Amendment to the states. In United States v. Cruikshank, a rioting band of whites burned down a Louisiana courthouse occupied by group of armed blacks (following the disputed 1872 elections). [FN121] William Cruikshank and a handful of whites who allegedly participated were prosecuted under the federal Enforcement Act, which made it unlawful for private citizens to *757 deprive others of their constitutional rights. [FN122] Cruikshank was convicted of conspiring to deprive the blacks of the rights they had been granted by the Constitution, including the right peaceably to assemble and the right to bear arms. [FN123]

The Supreme Court held the Enforcement Act unconstitutional. [FN124] According to the Court, the Fourteenth Amendment did give Congress the power to prevent interference with rights granted by the Constitution. [FN125] The Court maintained, however, that the right to assemble and the right to arms were not rights granted or created by the Constitution, because they were fundamental human rights that pre-existed the Constitution. [FN126]

Subsequently, the Supreme Court itself and lower courts as well have been unable to establish a settled position for what Cruikshank means. Cruikshank involved private citizens harming other *758 private citizens--so the most direct reading of Cruikshank is that there cannot be a Fourteenth Amendment violation unless there is state action. [FN127] A second implication of Cruikshank, given the case's language that the Second Amendment simply protects the right to arms from federal infringement, would be cited in dicta in later cases as supporting the theory that the Second Amendment and the rest of Bill of Rights are not directly enforceable against the states. [FN128] A third interpretation was offered by some twentieth century Supreme Court

opinions: such cases cite Cruikshank to mean that the Fourteenth Amendment does not incorporate the Second Amendment. [FN129]

B. Presser v. Illinois

Another case that involved the interplay of the Second and Fourteenth Amendments and generated disagreement among later courts is Presser v. Illinois. [FN130] The case arose out of a state law banning armed parades in public. The purpose of the law was to suppress demonstrations by labor organizations, which wanted to show that they could resist company goons and the like.
The Supreme Court unanimously upheld the Illinois parade ban. First, the Court held that the Illinois ban on armed parades did "not infringe the right of the people to keep and bear arms." [FN131] This holding is consistent with traditional common law boundaries on the right to arms, which prohibited terrifyingly large assemblies of *759 armed men. [FN132] Furthermore, the Court noted that the Second Amendment by its own force "is a limitation only upon the power of Congress and the National Government, and not upon that of the States." [FN133] Thus far, Presser was consistent with the most straightforward reading of Cruikshank.

Did some other part of the Constitution make the Second Amendment enforceable against the states? The Court added that the Illinois law did not appear to interfere with any of the "privileges or immunities" of citizens of the United States, although the Court never used the words "Fourteenth Amendment." [FN134]

If we presume that the Court meant "Fourteenth Amendment Privileges and Immunities," then Presser is consistent with all the other Fourteenth Amendment cases from the Supreme Court in the 1870s and 1880s, which consistently rejected the proposition that any part of the Bill of Rights is among the "Privileges and Immunities" protected by the Fourteenth Amendment. [FN135]

Could the Second Amendment - or any other part of the Bill of Rights - be protected from state and local infringement by another part of the Fourteenth Amendment such as Due Process clause? The Presser Court had nothing to say on the subject, since Due Process incorporation did not yet exist as a legal theory. Not until eleven years after Presser was decided did the theory of Due Process incorporation arise in the Supreme Court, when the Court held that the Fourteenth Amendment Due Process clause incorporated the right to compensation for property taken by the state, as guaranteed in the Fifth Amendment. [FN136]

In the twentieth century, Presser was cited by Justice Brennan for the proposition that the Second Amendment was not one of the Fourteenth Amendment's Privileges and Immunities. [FN137] Presser *760 was also listed among a series of cases which, according to Justice Black, had merely hinted, but never explicitly stated, that particular Bill of Rights provisions were not Fourteenth Amendment Privileges and Immunities. [FN138]

In 1908, the Court in Twining v. New Jersey refused to make the Fifth Amendment's self-incrimination guarantee applicable to state criminal trials via the Fourteenth Amendment. [FN139] Twining did explicitly state, however, that Presser held that the Second Amendment

was not a Fourteenth Amendment Privilege or Immunity. [FN140] Additionally, Maxwell v. Dow, an 1899 case also involving the Fourteenth Amendment, had interpreted Presser to mean that the Second Amendment did not, by itself, directly apply to the states. [FN141]

Presser's meaning has been interpreted differently by the courts, and determining the outer reaches of the case is difficult. Yet in cases decided in the 1980s and 1990s, federal courts have been asked to rule on whether the Fourteenth Amendment Due Process clause makes the Second Amendment enforceable against the states. [FN142] These courts claim that Presser is binding precedent on this issue, so that a modern court may not even consider the matter. [FN143] However, given that Presser had never even addressed the then-unknown issue of Due Process incorporation, modern courts are hiding behind a mischaracterization of Presser, rather than legitimately relying on Presser as a controlling precedent.
*761 This is where Miller v. Texas comes in. [FN144] Miller was the first Supreme Court case after Presser to address the Second/Fourteenth Amendment issue. The case provides guidance as to what Presser and Cruikshank meant to the Supreme Court near the end of the nineteenth century. [FN145]

III. Miller v. Texas in the Supreme Court

Although Franklin Miller's troubles had grown out of his inter-racial relationship with a black woman, the attempted arrest was for violating a weapons law: Texas's 1871 Reconstruction Act. [FN146] The Act prohibited the carrying of pistols and knives and allowed a warrantless arrest for alleged violations. [FN147]

Miller's murder conviction was affirmed by the Texas Court of Criminal Appeals on January 21, 1893. [FN148] Miller petitioned for a rehearing, raising for the first time the claim that the Reconstruction Act of 1871 violated the Second, Fourth, and Fourteenth Amendments. [FN149] The case then went to the Supreme Court and Miller lost on every issue. [FN150] Despite the law against carrying *762 pistols and its mandatory arrest provision, the Court held that the record did not reflect that Miller had been denied his rights under the Second or Fourth Amendments. The Court explained:

> In his motion for a rehearing, however, defendant claimed that the law of the State of Texas forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the Second and Fourth Amendments to the Constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions. [FN151]

The excerpt above is indicative of the Court's Bill of Rights jurisprudence at the end of the nineteenth century. [FN152] The Court held that a ban on concealed weapons was one of the exceptions implicit in the Bill of Rights-- similar to the implicit exception in the First Amendment to allow a ban on blasphemy, libel, or indecency. [FN153] *763

The Miller Court then addressed the question of whether the Second or Fourth Amendments were even applicable to Texas law: "[A]nd even if he were [denied the benefit of the Second and Fourth Amendments], it is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts." [FN154]

This part of the opinion follows the straightforward interpretation of the holding in Presser and the dicta in Cruikshank - that the Second Amendment by its own terms only restricts the federal government. [FN155]

The Supreme Court then turned to the claim that the Texas statute violated the Second and Fourth Amendments as incorporated in the Fourteenth Amendment. The Court refused to address the claim as it was not made in a timely fashion:

> And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. . . . A privilege or *764 immunity under the Constitution of the United States cannot be set up here . . . when suggested for the first time in a petition for rehearing after judgment. [FN156]

Rather than reject a Privileges and Immunities incorporation of the Second and Fourth amendments into the Fourteenth, the Supreme Court simply refused to decide the defendant's claim because the Court's powers of adjudication were limited to the review of errors timely objected to in the trial court. This is a rather odd way to proceed if the issue had really been settled by Presser in 1886. It bears emphasis that the Miller Court did not deem the issue well settled. This stands in stark contrast to what some modern courts assume. [FN157] Miller treated the question as open, but not presently appropriate for the Court to decide. Furthermore, in 1899, the Court, in Maxwell v. Dow, described Presser as only bearing on direct application of the Second Amendment to the states rather than as deciding the issue of Privileges and Immunities incorporation. [FN158]

So where does this leave us today? Miller v. Texas suggests that the Supreme Court of the 1890s did not view Presser or Cruikshank as foreclosing the possibility that the Second Amendment might apply to the states as a Fourteenth Amendment Privilege or Immunity. [FN159] The issue of incorporation via the Due Process clause was not even addressed, much less disposed of. At the dawn of the twenty-first century, Miller v. Texas teaches us that *765 the legal history of the nineteenth century does not deprive us of the freedom to decide the issue. There are no binding precedents to limit our choices.

Conclusion

What really happened during that fatal confrontation between Franklin Miller and the Dallas Police? We will never know for sure. However, the Miller case reminds us that some principles of criminal justice, and human nature, are still very relevant today: that people who cross certain

social boundaries-- including racial lines--may be singled out for government harassment; that in confrontations between the police and social outcasts, juries tend to believe the police, even when the evidence is not necessarily clear; that the killing of a police officer, even in possible self-defense, tends to arouse the worst passions of the community. [FN160]

The Miller case has been discussed in law review articles, and has appeared in briefs filed with the Supreme Court, from the 1930s to the present. [FN161] This article, however, was the first to discover that Franklin Miller was not executed, even after he had lost in the Supreme Court. Although Miller was a convicted cop-killer who had exhausted all his appeals, the Governor of Texas spared his life. Perhaps the Governor studied the issues surrounding the case carefully enough to recognize that there were serious questions about whether Miller was the aggressor or the victim and whether he was unfairly targeted by the police. Today, when executive pardons are fodder for political attacks, and when the death penalty is becoming more frequent (especially in Texas), Miller v. Texas reminds us that an essential component of a truly fair system of criminal justice is an executive who has the courage and the insight to use his power of clemency. As a matter of law, *766 Miller stresses our freedom of choice about firearms policy. The incorporation of the Second Amendment into the Fourteenth Amendment is still an open issue, not one for which our choices have been controlled.

Footnotes

[FNa1]. Special Agent, Federal Bureau of Investigation; L.L.M. 1999, New York University School of Law; L.L.M. 1994, George Washington University National Law Center; J.D. 1992, New England School of Law; B.A. 1989, The Ohio State University.

[FNaa1]. Research Director, Independence Institute, Golden, Colorado (http://www.i2i.org); Associate Policy Analyst, Cato Institute, Washington, D.C. (http://www.cato.org); adjunct professor of law, New York University School of Law, 1998- 99; J.D., 1985, University of Michigan Law School; B.A., 1982, Brown University. Co-author Gun Control and Gun Rights: A Course book (forthcoming 2002); Supreme Court Gun Cases (forthcoming 2002); editor Guns: Who Should Have Them? (1995); author The Samurai, The Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? (1992); Antitrust After Microsoft (2001).

[FNaaa1]. J.D., Georgetown University, 1978; Ph.D., Florida State University, 1972. Attorney at Law, Fairfax, Virginia. Philosophy Professor at Tuskegee Institute, Howard University, and George Mason University, 1972-1981. Author of Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866- 1876 (1998); A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees (1989); That Every Man Be Armed: The Evolution of a Constitutional Right (1984).

[FN1]. E.g., David B. Kopel, Police Violence in Encyclopedia of Violence in the United States (Charles Scribner's Sons, 1999).

[FN2]. Miller v. Texas, 153 U.S. 535 (1894).

[FN3]. Presser v. Illinois, 116 U.S. 252 (1886).

[FN4]. See, e.g., Fresno Rifle Club v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992) (upholding California's Assault Weapons Control Act); Quilici v. Vill. of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982) (upholding handgun ban), cert. denied, 464 U.S. 863 (1983); see also Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998) (invalidating city's "assault weapon" ban as vague and violative of equal protection, but stating in dictum

that Presser held that the Second Amendment did not apply to the states).

[FN5]. E.g., Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967).

[FN6]. 153 U.S. 535 (1894).

[FN7]. The issue would remain unresolved in the Miller decision, since Mr. Miller had failed to raise the issues below. See infra, note 135 and accompanying text.

[FN8]. Convict Record Ledger Data Transcription Form-Later Records, July 18, 1895, reproduced from, The Holdings of the Texas State Archives [hereinafter Convict Record Ledger Data] (on file with authors). According to Bill Simmons, Archival Services Staff, Archives and Information Services Division, Texas State Archives, there are two sets of ledgers which contain personal information about the convicts in the Texas state prison system: the convict record ledgers and the conduct registers. Letter from Bill Simmons, Archival Staff Member, Texas State Library and Archives Commission, to Cynthia Leonardatos (Nov. 18, 1999) (on file with authors). With regards to the physical description of Franklin P. Miller, the following information was recorded in these ledgers: Miller was 5'8" and weighed 149 pounds. He had blue eyes, dark hair, and a fair complexion. He had a scar on his left shin and a boil scar on the small of his back. Miller was a non-smoker, and he wore a size ten shoe. Id.

[FN9]. A Fearful Deed, Dal. Morn. News, June 18, 1892, at 1.

[FN10]. Convict Record Ledger Data, supra note 8, at 1.

[FN11]. A Fearful Deed, supra note 9, at 1.

[FN12]. A Fearful Deed, supra note 9, at 1.

[FN13]. A Fearful Deed, supra note 9, at 1.

[FN14]. A Fearful Deed, supra note 9, at 1.

[FN15]. A Fearful Deed, supra note 9, at 1. Regarding this agreement, the newspaper articles differ as to the amount of money Miller paid Anderson each month. According to an article written in the Galveston Daily News, Miller paid Anderson $10 a month. Blood in Dallas, Galveston Daily News, June 18, 1892, at 1. On the other hand, the Dallas Morning News reported that Miller paid Anderson $1 a month. A Fearful Deed, supra note 9, at 1.

[FN16]. A Fearful Deed, supra note 9, at 1.

[FN17]. A Fearful Deed, supra note 9, at 1.

[FN18]. A Fearful Deed, supra note 9, at 1; see also Blood in Dallas, Galveston Daily News, June 18, 1892, at 1; *Foul Murder - A Desperado Fires Upon Two Officers*, Dal. Daily Times-Herald, June 17, 1892, at 1, 5 (describing Anderson as a "young and greasy-looking negress ... a black and ugly wench of 30 years ... a sharp and rather shrewd creature").

[FN19]. A Fearful Deed, supra note 9, at 1; Blood in Dallas, supra note 15, at 1; Foul Murder - A Desperado Fires Upon Two Officers, supra note 18, at 1. According to the latter article, Miller was arrested for adultery. See 1879 Tex. Penal Code 333-336. The 1879 Texas adultery statute provided:
Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other, without living together, of a man and woman when either is lawfully married to some other person. The proof of marriage in such cases may be made by the production of the original marriage license and return thereon, or a certified copy thereof, or by the testimony of any person who was present at such marriage, or who has known the husband and wife to live together as married persons. When the offense of adultery has been committed, both parties are guilty, although only one of them may be married. Every person guilty of adultery shall be punished by fine not less than one hundred nor more than one thousand dollars.
Id. Unfortunately, the news articles do not contain information as to the reason why the officers failed to arrest

Mattie Anderson along with Miller if they were both guilty of adultery. There is also no information to indicate what evidence the officers had to prove that Miller or Anderson committed adultery. It is quite possible, on the other hand, that the officers mistakenly arrested Miller for violating Texas' fornication statute which defined such behavior as "the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried." Id.

[FN20]. See Philip Perlmutter, Divided We Fall 47 (1992) ("For Whites in America, Black-White sexual relations were most opposed."); id. at 74 (detailing legislation passed by states imposing fines, banishment or whippings for the crime of "'fornication with a Negro man or women'"); Ronald Takaki, A Different Mirror 109 (1993) ("Everywhere, white social sentiment abhorred white and black relationships."). Like many other Southern states at the time, Texas had a miscegenation statute which punished blacks and whites who intermarried or who married outside the state but who lived in Texas as man and wife. Violation of the law resulted in two to five years in the penitentiary. 1879 Tex. Penal Code 326.
Legal restraints on miscegenation date from early colonial Virginia where, for example, Hugh Davis was "to be soundly whipped before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians by defiling his body in lying with a Negro; which fault he is to acknowledge next Sabbath day." Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1191 (1969).

[FN21]. 1879 Tex. Penal Code 326.

[FN22]. Takaki, supra note 20, at 138.
By the end of the nineteenth century, however, the possibility of progress for blacks was distressingly remote. Racial borders had been reinforced by class and caste ... During the 1890's, new laws buttressed segregation by defining more precisely the "Negro's place" on trains and streetcars and in schools, parks, theaters, hotels, and hospitals ... Poll taxes and literacy requirements for suffrage were effectively disfranchising blacks, and hundreds of blacks were annually being lynched. This era was brutally repressive.
Takaki, supra note 20, at 138.

[FN23]. A Fearful Deed, supra note 9, at 1.

[FN24]. A Fearful Deed, supra note 9, at 1.

[FN25]. A Fearful Deed, supra note 9, at 1.

[FN26]. A Fearful Deed, supra note 9, at 1.

[FN27]. A Fearful Deed, supra note 9, at 1. Newspaper accounts of the story do not include any information as to why Miller expected an escalation of the conflict between him and the officers.

[FN28]. Tex. Const. art. I, §23 (1876).

[FN29]. Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 Baylor L. Rev. 629, 666- 67 (1989).

[FN30]. Tex. Const. art. I, § 23 (1876).

[FN31]. See An Act to Regulate the Keeping and Bearing of Deadly Weapons Law of April 12, 1871, ch. 34, §1, 1871 Tex. Gen. Laws 25; 6 H.P.N. Gammel, Laws of Texas 927 (1898). Miller must have been arrested for violating this statute because he challenged the legality of this law in a motion for rehearing after his conviction had been affirmed by the Court of Criminal Appeals of Texas. Miller v. Texas, 153 U.S. 535, 536 (1894).

[FN32]. Id.; see 1879 Tex. Penal Code 314.
If any person shall go into any public place, or into or near any private house, or along any public street or highway near any private house, and shall use loud and vociferous or obscene, vulgar or indecent language, or swear, or curse, or expose his person, or rudely display any pistol or other deadly weapon in such public place, or upon such

public street or highway, or near such private house, in a manner calculated to disturb the inhabitants thereof, he shall be fined in a sum not exceeding one hundred dollars.
Id.

[FN33]. An Act to Regulate the Keeping and Bearing of Deadly Weapons Law of April 12, 1871, ch. 34, §1, 1871 Tex. Gen. Laws 25.

[FN34]. Id.

[FN35]. Id.

[FN36]. Id.; see Halbrook, supra note 29, at 658, 671; see also 1879 Tex. Penal Code 318-23.

[FN37]. 42 Tex. 455 (1874).

[FN38]. Id.

[FN39]. A Fearful Deed, supra note 9, at 1.

[FN40]. A Fearful Deed, supra note 9, at 1.

[FN41]. A Fearful Deed, supra note 9, at 1.

[FN42]. A Fearful Deed, supra note 9, at 1.

[FN43]. A Fearful Deed, supra note 9, at 1.

[FN44]. A Fearful Deed, supra note 9, at 1.

[FN45]. A Fearful Deed, supra note 9, at 1.

[FN46]. A Fearful Deed, supra note 9, at 1. See generally Stevenson v. United States, 162 U.S. 313, 321-23 (1896) (restating the common law rule that law enforcement's excessive use of deadly force can be resisted by an innocent party and that innocent party may use deadly force, if necessary).

[FN47]. A Fearful Deed, supra note 9, at 1.

[FN48]. A Fearful Deed, supra note 9, at 1.

[FN49]. A Fearful Deed, supra note 9, at 1.

[FN50]. A Fearful Deed, supra note 9, at 1.

[FN51]. A Fearful Deed, supra note 9, at 1.

[FN52]. A Fearful Deed, supra note 9, at 1.

[FN53]. A Fearful Deed, supra note 9, at 1.

[FN54]. A Fearful Deed, supra note 9, at 1.

[FN55]. A Fearful Deed, supra note 9, at 1.

[FN56]. A Fearful Deed, supra note 9, at 1.

[FN57]. A Fearful Deed, supra note 9, at 1.

[FN58]. A Fearful Deed, supra note 9, at 1.

[FN59]. A Fearful Deed, supra note 9, at 1.

[FN60]. A Fearful Deed, supra note 9, at 1.

[FN61]. A Fearful Deed, supra note 9, at 1.

[FN62]. A Fearful Deed, supra note 9, at 1. Officer Early's reference to a "self-acting" pistol evidently meant a double-action revolver, which could be fired simply by pulling the trigger. At that time, most handguns were probably single-action revolvers, which must first be cocked by pulling the hammer back and then may be discharged by pulling the trigger. Colt marketed its first double-action revolver in 1877, calling it the New Double Action Self-Cocking Central Fire Six Shot Revolver. Charles T. Haven & Frank A. Belden, A History of the Colt Revolver 162 (1940). It was later named the Lightning Model. Id. Smith & Wesson marketed its first double-action revolver, the .38 Double Action First Model, in 1880. Roy G. Jinks, History of Smith & Wesson 124-25 (Reinfeld Publ'g Inc. 1977). Semi-automatic ("self-loading") pistols would not come onto the scene until early in the twentieth century. Id. at 234-37.

[FN63]. A Fearful Deed, supra note 9, at 1.

[FN64]. A Fearful Deed, supra note 9, at 1.

[FN65]. A Fearful Deed, supra note 9, at 1.

[FN66]. A Fearful Deed, supra note 9, at 1. Lynchings were not reserved only for blacks. Whites were also the victims of this extra-legal death penalty. Between 1882-1951 in Texas, there were one-hundred and forty-one whites lynched compared to three-hundred and fifty-two blacks. Racial Violence in the United States 57 (Allen D. Grimshaw ed., 1969). In 1892 in Texas, sixty-nine whites and one-hundred and sixty-one blacks were lynched. Id. at 58. The principle cause of lynchings nationwide during the period 1882-1951 was homicide. Id. at 59. Being charged with any crime, however, does not necessarily mean that the person lynched was guilty of that crime.

[FN67]. A Fearful Deed, supra note 9, at 1.

[FN68]. A Fearful Deed, supra note 9, at 1. Miller's fear of the growing mob was quite understandable. As Milton Konvitz explains, "Since legal processes were often slow and unsatisfactory, ... to provide swifter and more effective punishment, the South turned to the device of the citizen-mob, long known on the frontier as lynch law." Milton R. Konvitz, A Century of Civil Rights Law 6-7 (1961) (internal quotation marks omitted). See generally James Elbert Cutler, Lynch-Law: An Investigation into the History of Lynching in the United States (1905) (surveying the origins, history and practice of lynch-law in the United States).

[FN69]. A Fearful Deed, supra note 9, at 1.

[FN70]. A Fearful Deed, supra note 9, at 1.

[FN71]. A Fearful Deed, supra note 9, at 1.

[FN72]. A Fearful Deed, supra note 9, at 1.

[FN73]. A Fearful Deed, supra note 9, at 1.

[FN74]. A Fearful Deed, supra note 9, at 1.

[FN75]. A Fearful Deed, supra note 9, at 1.

[FN76]. A Fearful Deed, supra note 9, at 1.

[FN77]. A Fearful Deed, supra note 9, at 1.

[FN78]. A Fearful Deed, supra note 9, at 1.

[FN79]. A Fearful Deed, supra note 9, at 1.

[FN80]. Racial Violence in the United States, supra note 66, at 59.
The vigilance of law enforcement officials and the intelligent action of members of private citizens have kept many intended victims from being put to death. Were precautions not taken to save accused persons from mob law, such as augmenting guards, removing the prisoner to a place of safekeeping, using force to disperse the mob, or some other stratagem, the annual lynching record would contain more names than are now listed.
Racial Violence in the United States, supra note 66, at 59.

[FN81]. A Fearful Deed, supra note 9, at 1. The crowd continued to be inflammatory and violent. During these addresses, a small man with a "strong foreign accent" yelled, "I'll furnish a small cannon to blow down the tam shale." A Fearful Deed, supra note 9, at 1.

[FN82]. A Fearful Deed, supra note 9, at 1.

[FN83]. A Fearful Deed, supra note 9, at 1. Another Dallas police officer, Officer Brewer, had been killed three weeks earlier by Henry Miller, an unrelated assailant. A Fearful Deed, supra note 9, at 2.

[FN84]. A Fearful Deed, supra note 9, at 1. After the cheering by the crowd had ceased, the following resolution was adopted:
Resolved by the citizens of Dallas, that we condemn in unmeasured terms the lawlessness and the impunity with which a man's life can and has been taken, and we feel that the law, as now administered, is a farce and affords no relief and that it is further the sense of those assembled that we are compelled, for our own safety and that of our citizens, to take the law in our own hands.
A Fearful Deed, supra note 9, at 2.

[FN85]. A Fearful Deed, supra note 9, at 2.

[FN86]. A Fearful Deed, supra note 9, at 1.

[FN87]. A Fearful Deed, supra note 9, at 1. Judges Tucker and Burke who stood with the Mayor, Sheriff, and Chief of Police in front of the jail, were assaulted by Ford House as they walked toward the jail for the purpose of protecting Miller. A Fearful Deed, supra note 9, at 1.

[FN88]. A Fearful Deed, supra note 9, at 1.

[FN89]. The Attack on the Jail, Dal. Morn. News, June 19, 1892, at 12; see also The Attack on the Jail, Galveston Daily News, June 20, 1892, at 6.

[FN90]. The Attack on the Jail, Dal. Morn. News, June 19, 1892, at 12.

[FN91]. The Trial of P.F. Miller, Dal. Morn. News, July 21, 1892, at 8. [hereinafter Dal. Morn. News]. Miller's demeanor during the trial was described as follows: "Miller throughout the trial evidenced the keenest interest in the proceedings. His ears caught every word that fell from the lips of the witnesses and at moments he showed symptoms of irritation ... Miller does not smile at anybody and his looks are serious." The Trial of P.F. Miller, Galveston Daily News, July 23, 1892, at 6 [hereinafter Galveston Daily News].

[FN92]. Dal. Morn. News, supra note 91, at 8. Officer Early must have left the police force after the shooting death of his partner, because the news articles refer to him as "ex-policeman." Dal. Morn. News, supra note 91, at 8.

[FN93]. Dal. Morn. News, supra note 91, at 8.

[FN94]. Dal. Morn. News, supra note 91, at 8.

[FN95]. Dal. Morn. News, supra note 91, at 8.

[FN96]. Dal. Morn. News, supra note 91, at 8.

[FN97]. Dal. Morn. News, supra note 91, at 8.

[FN98]. Dal. Morn. News, supra note 91, at 8. It is unclear from the newspaper articles if George Miller identified the wrong officer as target of Franklin Miller's search. If Franklin Miller was angry at any officers, it would stand to reason that he would not have been looking for Officer Riddle, but, instead, Officers Lamar and Estelle who arrested him as a result of his relationship with Mattie Anderson. If Franklin Miller did intend to threaten Officer Riddle, the reason for the menacing remark is indeterminate.

[FN99]. Dal. Morn. News, supra note 91, at 8.

[FN100]. Dal. Morn. News, supra note 91, at 8.

[FN101]. Dal. Morn. News, supra note 91, at 8.

[FN102]. Dal. Morn. News, supra note 91, at 8.

[FN103]. Galveston Daily News, supra note 91, at 6.

[FN104]. Galveston Daily News, supra note 91, at 6.

[FN105]. Galveston Daily News, supra note 91, at 6. Other state's witnesses testified as follows: Dr. D.L. Thompson testified as to Riddle's injuries. Galveston Daily News, supra note 91, at 6. W. Dresser testified that Riddle was shot and while a liquid was being poured into him, Miller said, "They can pour it down him, but I will get another son of an etc. before they get me." Galveston Daily News, supra note 91, at 6. Officer H.C. Lamar testified that the evening before Riddle was killed he told the witnesses that he was going to arrest the defendant for carrying a pistol. Galveston Daily News, supra note 91, at 6. Assistant Chief of Police Cornwell testified to the arrest of Miller and to the finding of two pistols and two boxes of cartridges. Id. Tom Wilson testified that Riddle did not fire a shot. Galveston Daily News, supra note 91, at 6.

[FN106]. Galveston Daily News, supra note 91, at 6.

[FN107]. Galveston Daily News, supra note 91, at 6.

[FN108]. Galveston Daily News, supra note 91, at 6.

[FN109]. 1879 Tex. Penal Code 605 (defining a first degree murderer as "[e]very person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this state with malice aforethought, either express or implied").

[FN110]. Death Penalty Assessed, Dal. Morn. News, July 24, 1892, at 12. Miller's reaction to the verdict was described as follows:
Not a muscle moved in Miller's face. He fixed his gaze on the clerk, braced himself up in his chair and bent forward to catch every word. His piercing eyes, which are a mixture of blue and gray, one opened a little wider than the other, did not move, and when at the conclusion the clerk's voice rang out clear and distinct and assess his punishment at death Miller was perfectly calm. He seemed to accept it philosophically, and after a moment's reflection he reached for the glass and pitcher on the table in front of him and took a drink of water.
Id. (internal quotation marks omitted).

[FN111]. Concerning justifiable homicide, Judge Tucker charged the jury as follows:

If you believe from the evidence that the defendant did kill the deceased, Riddle, as charged in the indictment, but should further believe from the evidence that at the time defendant took up his pistol and fired the first shot fired by him, the deceased Riddle, or the policeman, Early, was attempting to use upon him a deadly weapon, or by some act done by said Riddle or Early at the time reasonably indicated to the defendant, and created in the mind of the defendant a reasonable expectation or fear that they were or either of them was about to make an unlawful attack upon the defendant with a weapon calculated to produce death or serious bodily injury, then it would be presumed from such act that they intended to make use of such weapon to kill the defendant, or to inflict serious bodily injury upon him, and you will in such case acquit the defendant as having acted in his lawful self-defense. Id.; see 1879 Tex. Penal Code 552-575.

[FN112]. Death Penalty Assessed, Dal. Morning News, July 24, 1892, at 12.

[FN113]. Miller v. State, 20 S.W. 1103 (1893). Miller was interviewed by a reporter on January 21, 1893. He told the reporter that he did not expect the Appellate Court to rule in his favor and he was prepared to die. Miller's Death Watch, Dal. Morning News, Jan. 22, 1863, at 2. Miller was housed in the "doomed man's cell" in the jail and he was placed under a death watch. Id.

[FN114]. The Sentence of Death, Dal. Morn. News, July 18, 1893, at 8.

[FN115]. Id. Miller was interviewed again six days before his scheduled date of execution. When asked if he felt resigned to his fate, Miller responded, "Yes, We should resign ourselves to the inevitable; though of course, a man hates to die on the gallows." Franklin P. Miller, Dal. Morn. News, Aug. 13, 1893, at 16.

[FN116]. Franklin P. Miller's Case, Dal. Morn. News, Aug.15, 1893, at 8.

[FN117]. See infra Part IV (discussing Miller's case before the Supreme Court).

[FN118]. Convict Record Ledger Data, supra note 8.

[FN119]. Convict Record Ledger Data, supra note 8.

[FN120]. Convict Record Ledger Data, supra note 8.

[FN121]. 92 U.S. 542 (1876). Competing Republican and Democratic factions claimed to have won the offices of judge and sheriff in Grant Parish, Louisiana, in the chaotic elections of 1872. See S. Halbrook, Freedmen, The Fourteenth Amendment, and the Right to Bear Arms: 1866-1876, 159 (1998). In March 1873, a Republican faction, led by black militia officer William Ward, seized the courthouse in Colfax, the parish seat. Id.

[FN122]. Enforcement Act, 16 Stat. 140 (1870).

[FN123]. George C. Rable, But There Was No Peace: The Role of Violence in the Politics of Reconstruction 125-29 (1984).

[FN124]. United States v. Cruikshank, 92 U.S. 542 (1875).

[FN125]. Id. at 551-53.

[FN126]. Id. The Court explained:
The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection ....
The right ... of bearing arms for a lawful purpose ... is not a right granted by the Constitution. Neither is it in any

manner dependent on that instrument for its existence. The second amendment declares that it shall not be infringed; but this ... means no more than it shall not be infringed by Congress ... leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called... the powers which relate to merely municipal legislation. Id.

[FN127]. Logan v. United States, 144 U.S. 263, 286- 88 (1892) (holding that the First Amendment right to assembly and the Second Amendment right to arms are similar, and that the Bill of Rights protects neither against private interference).

[FN128]. Spies v. Illinois, 123 U.S. 131 (1890) (stating that the Second Amendment and other Bill of Rights protections are not directly applicable to states); Eilenbecker v. Plymouth County, 134 U.S. 31 (1890) (same).

[FN129]. See, e.g., Malloy v. Hogan, 378 U.S. 1 (1964); Knapp v. Schweitzer, 357 U.S. 371 (1958).

[FN130]. 116 U.S. 252 (1886). See generally S. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. Det. Mercy L. Rev. 943 (1999).

[FN131]. Presser, 116 U.S. at 265.

[FN132]. 1 William Hawkins, A Treatise of the Pleas of the Crown 126 (Garland Publ'g 1978) (1716) (observing that a Justice of the Peace may require surety from persons who "go about with unusual Weapons or Attendants, to the Terror of the People").

[FN133]. Presser, 116 U.S. at 265.

[FN134]. Id. at 266.

[FN135]. Id.

[FN136]. Chicago B.& Q. R. R. v. Chicago, 166 U.S. 226 (1897).

[FN137]. Malloy v. Hogan, 378 U.S. 1, 5 n.2 (1964).

[FN138]. Adamson v. California, 332 U.S. 46, 70-71 (1947) (Black, J., dissenting).

[FN139]. Twining v. New Jersey, 211 U.S. 78 (1908), overruled by Malloy v. Hogan, 378 U.S. 1 (1964).

[FN140]. Id. at 98- 99.

[FN141]. Maxwell v. Dow, 176 U.S. 581, 597 (1899).

[FN142]. See, e.g., Fresno Rifle Club v. Van de Kamp, 965 F.2d 723, 730 (9th Cir. 1992) ("Therefore, there is no reason to believe that Miller left open the incorporation question any more than Cruikshank or Presser."); Quilici v. Vill. of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982) (upholding handgun ban); see also Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998) (invalidating city's "assault weapon" ban as vague and violative of equal protection, but stating in dictum that Presser held that the Second Amendment did not apply to the states).

[FN143]. See id.

[FN144]. 153 U.S. 535 (1894).

[FN145]. Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876).

[FN146]. An Act to Regulate the Keeping and Bearing of Deadly Weapons, Law of April 12, 1871, ch. 34, §1, 1871

Tex. Gen. Laws 25.

[FN147]. Id. The Reconstruction Act of 1871 was not substantially modified until 1995, when the legislature passed, and Governor George W. Bush, IV, signed, a law establishing a uniform and objective system for the issuance of concealed handgun permits to adults who pass a background check and a safety class. See Tex. Gov't Code Ann. §411.171, et seq. (Vernon 1998).

[FN148]. Miller v. Texas, 153 U.S. 535, 538 (1894).

[FN149]. See infra Part II.G.; see also Miller, 153 U.S. at 538.

[FN150]. Id. at 535-36. The Court's syllabus summarized the defendant's arguments as follows:
That the statute of the state of Texas prohibiting the carrying of dangerous weapons on the person, by authority of which statute the court charged the jury that, if defendant was on a public street carrying a pistol, he was violating the law, infringed the right of the defendant as a citizen of the United States, and was in conflict with the 2d Amendment to the Constitution of the United States, providing that the right of the people to keep and bear arms shall not be infringed; second, that the same statute, which provided that any person carrying arms in violation of the previous section, might be arrested without warrant, under which the court charged the jury that defendant, if he were carrying arms in violation of the statute, was subject to arrest without warrant, was in contravention of the 4th Amendment of the Constitution, which provides that the right of the people to be secure in their persons against unreasonable searches and seizures shall not be violated and of the 5th and 14th amendments, which provide that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall pass or enforce any law which shall abridge the privileges of or immunities of citizens of the United States.
Id.

[FN151]. Miller, 153 U.S. at 538.

[FN152]. See, e.g., Robertson v. Baldwin, 165 U.S. 275 (1897).

[FN153]. See id. at 281. Justice Brown, writing for the Court, elaborated as follows:
The law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by law prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or the verdict was set aside upon the defendant's motion.
Id. at 281- 82.

[FN154]. Miller, 153 U.S. at 538 (citing, inter alia, United States v. Cruikshank, 92 U.S. 542, 552 (1876)).

[FN155]. Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876).

[FN156]. Miller, 153 U.S. at 538-39. The court added that there "was no denial of [procedural] due process of law, nor did the law of the State, to which reference was made, abridge the privileges or immunities of citizens of the United States" Id. (emphasis in original). The same year it ruled that the mere fact that a person carried a gun could not be used a proof of homicidal intent, "provided he rightfully so armed himself for purposes simply of self-defense." Gourko v. United States, 153 U.S. 183, 191 (1894). For the late nineteenth-century Court's protective view toward armed self-defense, see David B. Kopel, *The Self Defense Cases: How the Supreme Court Confronted a Hanging Judge in the Nineteenth Century, and Some Tough Lessons for Jurisprudence in the Twenty-First*, 27 Am. J. Crim. L. 293 (2000).

[FN157]. See supra note 142.

[FN158]. 176 U.S. 581, 597- 98 (1899).

[FN159]. Miller, 153 U.S. at 536; Presser, 116 U.S. at 253; Cruikshank, 116 U.S. at 253.

[FN160]. Miller, 153 U.S. at 538.

[FN161]. See, e.g., Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 Am. U. L. Rev. 53, 61 n.19 (1992); David E. Murley, *Private Enforcement of the Social Contract: Deshaney and the Second Amendment Right to Own Firearms*, 36 Duq. L.Rev. 827, 842 (1998); Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 Ohio St. L.J. 1457, 1500 (2000).